HeartShare Human Services of New York, Inc. *and* Office and Professional Employees International Union, Local 153, AFL–CIO, Petitioner. Case 29–RC–8509

December 13, 1995

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached). The request for review raises a substantial issue solely with respect to the Regional Director's finding that direct care worker George Maldanado should not be included in the unit found appropriate. The Board finds, however, that this issue may best be resolved through the challenge procedure. Accordingly, the decision is amended to permit Maldanado to vote under challenge, and the request for review is denied in this and all other respects.[1]

[1] Review was requested of the Regional Director's rulings: (1) limiting the scope of the hearing to evidence of changed circumstances since the hearing in Case 29–RC–8451, involving the same Employer and Petitioner as in the instant case; (2) finding the petitioned-for single facility unit appropriate for bargaining; and (3) excluding three individuals from the unit found appropriate. Only the portions of the Regional Director's decision addressing the first two issues are attached.

APPENDIX

DECISION AND DIRECTION OF ELECTION

1. On July 6, 1995, I issued a Decision and Direction of Election in HeartShare Human Services of New York, Inc., Case 29–RC–8451 (the *Hagerty* decision), involving this Employer and Petitioner.[1] Therein, the Employer contended that the smallest appropriate unit was essentially a unit of all nonprofessional employees employed by the Employer at all its residential care facilities, including the Hart Street residence, the facility covered by the instant petition. The hearing lasted 8 days, and consisted of over 1100 pages of testimony from various witnesses and numerous exhibits. In the *Hagerty* decision, I rejected the Employer's argument that the smallest appropriate unit consisted of nonprofessional employees employed throughout its residential system, and directed an election in a unit of all full-time and regular part-time nonprofessional employees employed by the Employer at its Hagerty residence.

On August 1, 1995, an election was conducted in that matter. Because the Employer had expressed an intent to file a request for review, the ballots were impounded at the conclusion of the election. By letter dated August 3, 1995, to the Acting Executive Secretary of the Board, the Employer withdrew its ''intent to request review.'' The ballots were opened and counted on August 9, 1995, and a majority of the valid votes counted were cast for the Petitioner. On August 19, 1995, a Certification of Representative issued.

The hearing in the instant matter was opened on August 4, 1995. The Petitioner initially sought an election in a nonprofessional unit of employees employed by the Employer at its Hart Street residence, which like the *Hagerty* residence is an intermediate care facility which provides 24-hour care to developmentally disabled adults. At the hearing, the Petitioner amended the petitioned-for unit to include ''all full-time and regular part-time'' nonprofessional employees employed by the Employer at its Hart Street residence, and to list all the classifications of employees included in the *Hagerty* unit. The Employer took the position that employees who worked on a part-time basis at Hart Street, and were regularly employed on a full-time basis at other facilities, should not be included in the unit. The Employer further requested a 2-day adjournment so that it could research and develop a final position on the eligibility of part-time employees. The Hearing Officer requested an offer of proof as to what evidence the Employer would provide if its adjournment request was granted. After the Employer provided its offer of proof, the Hearing Officer, noting the recent, extensive litigation and the unit determination made in the *Hagerty* proceeding, denied the request, and stated her intention to close the hearing. The Employer then renewed its contention, litigated during the *Hagerty* proceeding, that the smallest appropriate unit consisted of all its residential care facilities, even though it had withdrawn its intent to file review of the *Hagerty* decision. The Hearing Officer, noting the extensive litigation concerning the scope of the unit during the *Hagerty* proceeding, closed the hearing, and advised the Employer of its right to submit a motion to reopen the record.[2]

By letters dated August 7 and 9, 1995, the Employer moved for the reopening of the record. The hearing was reopened on August 15, 1995. I subsequently, by Order, set forth the parameters of the hearing. The Hearing Officer's rulings are within the scope of those parameters, are free from prejudicial error, and are affirmed.

2. During the hearing, the Employer stipulated to the findings from the *Hagerty* proceeding concerning commerce. The Petitioner did not oppose the utilization of these findings to establish commerce.[3] In the *Hagerty* proceeding, the parties stipulated that HeartShare Human Services of New York, Inc. (the Employer), a New York not-for-profit corporation with a place of business, among others, located at 128 Montrose Avenue, Brooklyn, New York (the Hagerty facility), is engaged in the operation of an intermediate care facility for developmentally disabled adults. During the past year, a representative period, the Employer derived gross revenues

[1] The Hearing Officer took administrative notice of the transcript in that proceeding and the July 6, 1995 Decision and Direction of Election.

[2] Administrative notice is taken of the Employer's letter of August 3, 1995, withdrawing its intent to file review, the revised tally of ballots dated August 9, 1995, and the Certification of Representative dated August 19, 1995.

[3] As discussed further infra, the Petitioner took the position that the findings from the *Hagerty* proceeding were dispositive of all the issues the Employer raised during this hearing, and that the record should be closed based upon those findings.

in excess of $250,000. During the same period, the Employer purchased and received at its Brooklyn, New York facility goods, products, and materials valued in excess of $50,000 directly from points located outside the State of New York. The Employer is engaged in commerce within the meaning of the Act.

The parties also stipulated during the *Hagerty* proceeding that the Employer is a health care institution within the meaning of the Act.

Based on the foregoing stipulations and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and is a health care institution within the meaning of Section 2(14) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. At the hearing, the Employer, without any opposition from the Petitioner, agreed to utilize the stipulations and findings from the *Hagerty* proceeding to establish the Petitioner's labor organization status. Therein, the parties stipulated, and I found that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The labor organization involved here claims to represent certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. As discussed earlier, the Petitioner seeks an election in a unit of all full-time and regular part-time direct care employees, substitute direct care employees, maintenance employees, kitchen employees, housekeeping employees, and office clerical employees employed by the Employer at its 689 Hart Street, Brooklyn, New York residence excluding all other employees, managers, assistant managers, professional employees, guards, and supervisors as defined in the Act. The Employer contends that the only appropriate unit is a division wide unit consisting of all its residential care facilities. The Employer further argues that since it does not employ any office clerical employees at its Hart Street residence, office clerical employees should not be included in the unit. Finally, the Employer contends that some of the employees who work on a part-time basis at Hart Street, but are regularly employed by the Employer at other facilities, should be excluded from any unit found appropriate.

As noted above, the Employer's contention that the smallest appropriate unit is a multilocation unit consisting of all its residential care facilities was extensively litigated during the *Hagerty* proceeding. In this proceeding, the Employer sought to revisit the issue based upon changed circumstances and upon ''additional evidence'' which was not considered during the *Hagerty* proceeding.

At several points in the *Hagerty* decision, I noted the absence of various factors that could have supported the Employer's contention that the smallest appropriate (unit) is a multifacility unit. Several of these related to the Employer's argument that many of the medical specialists shared by the different facilities are supervisors within the meaning of the Act. Other areas in which the lack of evidence in support of the Employer's position was noted included the grievance procedure, the transfer of employees, the interdisciplinary meetings the Employer conducts at its residences, training, and the transfer of an employee. At the instant hearing, the Employer sought to introduce additional evidence with respect to each of these areas. It also moved to introduce evidence concerning changed circumstances which, it contended, now render a single location unit inappropriate. The Petitioner vigorously opposed any further litigation concerning the appropriateness of the unit, and moved to close the record based upon the findings in the *Hagerty* proceeding. Both parties submitted written appeals and motions concerning the scope of the hearing. The positions of the parties were carefully considered. On August 29, 1995, I issued an *Order on Special Appeal* which, inter alia, set the parameters of the hearing concerning the scope of the unit.

Representation proceedings impose dual and sometimes conflicting obligations upon the Board. They require a balancing of the fundamentals of due process[4] against the Board's duty to protect the integrity of its processes and provide for the prompt resolution of questions concerning representation.[5] I determined that this balance would best be achieved by limiting the hearing concerning the scope of the unit to evidence concerning changed circumstances.

The changed circumstances about which the Employer sought to present evidence were relatively few in number. Evidence concerning these changes was not available at the time of the *Hagerty* proceeding.

The additional information the Employer sought to introduce concerning the scope of the unit, however, clearly was available at the time of the hearing in *Hagerty*. The Employer had the opportunity, over 8 days of hearing, to present this evidence. It did not do so. Nor did it at any time seek to introduce that evidence after the close of the hearing by moving to reopen the record or filing a request for review. Rather, the Employer, in writing, declined to seek review of the *Hagerty* decision. Following the conduct of an election the ballots were opened and counted, and a Certification of Representative issued. In its motion to reopen the record to submit this evidence, the Employer makes specific references to the various clauses of the *Hagerty* decision in which the absence of evidence in support of the Employer's unit contentions is noted.[6] The Employer's request to submit additional evidence with respect to these areas is clearly an attempt to attack the factual underpinnings of the *Hagerty* decision. In addition to sanctioning protacted litigation, permitting further testimony concerning these areas would have rendered the *Hagerty* proceedings, the Employer's withdrawal of its request for review of that decision, the counting of the ballots, and the Certification of Representative a nullity. It would have effectively permitted a party, having waived review of an issue it had previously litigated, to relitigate it. Furthermore, it would compromise the integrity of the Board's processes, deprive parties of the finality to which these proceedings entitle them, and prevent the expeditious resolution of questions concerning representation. Accordingly, the Order on Special Appeal limiting the parameters

[4] *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995); *Barre-National, Inc*., 316 NLRB 877 (1995).

[5] *Bennett Industries*, 313 NLRB 1363 (1994).

[6] In contrast, the Employer's request to submit evidence concerning changed circumstances is not clearly directed at the factual underpinnings of the *Hagerty* decision. Rather, it is directed at other areas which the Employer urges the Region to consider prior to making a decision concerning the unit in the instant case.

of the hearing concerning the scope of the unit to the presentation of evidence concerning changed circumstances is affirmed.

As noted above, the changed circumstances are few. Terry McKeon, formerly the Employer's senior director of programs, testified that his title recently changed to assistant executive director. McKeon continues to direct the Employer's entire residential program and its childhood services program. However, the day treatment and family support programs are now overseen by Richard Martin, the other assistant executive director. Monica Richardson is no longer the manager of the *Hagerty* residence. Rather, Theresa Seib, the manager of the Hart Street residence, is also managing the *Hagerty* residence until a replacement for Richardson is hired.[7]

McKeon also testified that due to budgetary restraints, the Employer no longer employs a secretary at each facility. On July 1, 1995, the Employer laid off or transferred all but 2 of its 12 secretaries. At the time of the hearing, these two secretaries were working at different facilities depending on where their services were needed. The Employer was in the process of preparing a permanent office for these secretaries at the Doonan-Drake facility. The two secretaries continue to type quarterly reports and various memos for the different managers. However, their filing duties have been assumed by the managers. The different facilities continue to utilize the office equipment, telephones, and fax machines formerly operated by the secretaries. They also continue to maintain personnel files for their employees.

As discussed earlier, the Employer's position that the smallest appropriate unit includes nonprofessional employees at all its residential care facilities is inconsistent with its withdrawal of its request for review of the *Hagerty* decision. The Employer makes no attempt to reconcile its withdrawal of review with its multifacility contention. Nor does the Employer seek to explain how the nonprofessional employees at the Hagerty facility can be included in this multilocation unit when they have already been found to constitute a separate appropriate unit and the Petitioner has been certified as their representative.[8] The Employer does not assert that the unit should include all residential care facilities excluding Hagerty. If it did, it would have to justify the incongruous position that one appropriate unit consists of nonprofessional employees employed at Hagerty while the other includes nonprofessional employees at all its other facilities. It would also have to explain why a single facility unit of nonprofessional employees employed at Hagerty is appropriate while single facility units of nonprofessional employees employed at other residential care facilities are not.

In the *Hagerty* decision, the autonomy and separate identities of the different residential care facilities were discussed at great length. The record in the instant case does not establish that changed circumstances have obliterated their individual identities. With respect to the Hart Street residence, it continues to employ its own manager,[9] assistant manager, cook, housekeeper, quality mental retardation professional (QMRP), nurse, direct care workers (7), and substitute direct care workers (3). Managers continue to exercise significant authority in the areas of hiring, scheduling, evaluations, and discipline. The different facilities continue to maintain their own offices, recreation areas, kitchens, and dining areas. They continue to maintain their own sets of personnel files. Each continues to service clients with their own unique sets of challenges. (The Hart Street facility continues to care for severely retarded adolescents.) Accordingly, I find that the individual identity of the Hart Street facility has not been obliterated by the changes McKeon testified about. As stressed earlier, upholding the Employer's position would mean nullifying, without good cause, the results of the election in the *Hagerty* proceeding. It would deprive employees and parties of the finality to which they are entitled and which is so vital for stable labor relations. In view of the above, and the reasons enumerated in the *Hagerty* decision,[10] I find a unit of nonprofessional employees employed by the Hart Street facility to be an appropriate unit.

[7] In its brief, the Employer contends that the testimony adduced from Monica Richardson during the *Hagerty* proceeding should be disregarded in its entirety. It maintains that inasmuch as she managed a different residence, and her tenure was brief, no inferences can be drawn from her testimony with respect to the petitioned-for unit. Richardson was the Employer's witness. She testified in detail concerning her duties, and her role in scheduling, the assignment of work, and the disciplinary procedure. Contrary to the Employer's assertion, a considerable portion of her testimony concerned the Hart Street residence. She related various occasions in which she and Seib had interchanged employees under their supervision, often with no prior approval from their directors, to meet staffing shortages. Although she also discussed several incidents which did not involve the Hart Street residence, her testimony provides insight into the authority the Employer has bestowed upon its managers. Thus, as with the other portions of the record from the *Hagerty* proceeding, I will accord Richardson's testimony its appropriate weight.

[8] In its brief, the Employer states that it is choosing not to address the possible inconsistency of its unit position with its waiver of review because the August 29 Order on Special Appeal limiting the scope of litigation with respect to the appropriateness of a multisite unit, ''does not purport to be grounded'' on its waiver. As is clear from the August 29 Order, the circumstances surrounding the *Hagerty* proceeding were carefully considered prior to the issuance of that Order. The Employer's unit contentions cannot be analyzed in a vacuum. Unfortunately, when the Employer's position is considered in its full context, it becomes more difficult to understand.

[9] It was clear from the testimony of McKeon that Seib is only managing the *Hagerty* facility until a replacement for Richardson is found.

[10] Pp. 29–35.